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Supreme Court of the United States

October Term, 1943.

No. 389

WAYNE M. NEAL; THE LOUISVILLE DRYING
MACHINERY COMPANY; and CITRUS PAT-
ENTS COMPANY, - - - - - Petitioners,

VERSUS

STATE OF FLORIDA; THE STATE BOARD OF
EDUCATION OF FLORIDA; and STATE
BOARD OF CONTROL.

**PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA AND
BRIEF IN SUPPORT THEREOF.**

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WAYNE M. NEAL; THE LOUISVILLE DRYING
MACHINERY COMPANY; AND CITRUS PAT-
ENTS COMPANY, - - - - *Petitioners,*

v.

STATE OF FLORIDA; THE STATE BOARD OF
EDUCATION OF FLORIDA; AND STATE
BOARD OF CONTROL.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA.

*To the Honorable, the Chief Justice and Associate Justices
of the Supreme Court of the United States:*

This is a petition for a writ of certiorari, brought under Section 237 of the Judicial Code, as amended (28 U. S. C. 344b), to review the final judgment (as amended May 25, 1943) of the Supreme Court of the State of Florida. The petition raises certain federal questions under an Act¹ of Congress approved February 24, 1925 (43 Stat. 970, c. 308;

¹Printed in the Appendix hereto.

7 U. S. C. 361, 366, 370, 371, 373-376, 380, 382) which is hereinafter referred to as the *Purnell Act*, and under the due process clause of the 14th Amendment of the United States Constitution. In support of the petition, your petitioners sheweth:

SUMMARY STATEMENT OF THE MATTER INVOLVED.

1. This suit originated at Gainesville, Florida, in December, 1940, when the respondents herein jointly filed Chancery Suit No. 1061 C in the Circuit Court of the Eighth Judicial Circuit of Florida in and for Alachua County against your petitioners.

2. The respondent State of Florida is a sovereign State of the United States (R. 1). The respondent Boards of Education and of Control are State governmental agencies, controlling the University of Florida and its Agricultural Experiment Station, which is a department of the University (R. 2). These parties are herein designated as follows: the respondents jointly as plaintiffs; the University of Florida as the University; and the Agricultural Experiment Station as the Experiment Station.

3. Petitioner Wayne M. Neal was a member of the research staff of the University's Experiment Station and, as such, *an employee of plaintiffs* (R. 2, 7). Petitioner Louisville Drying Machinery Company is a Kentucky corporation of Louisville, Kentucky, licensed to do business in Florida (R. 1, 15), and petitioner Citrus Patents Company, a Florida corporation of Orlando, Florida (R. 2, 21). Mr. A. W. Lissauer of Louisville, Ky., is president of both corporate defendants (R. 24). These parties are desig-

nated as follows: the petitioners jointly as defendants; the individual defendant as Neal; the corporate defendants as Louisville Drying & Citrus Patents respectively; and the president of both corporate defendants as Lissauer.

4. This case involves the title of defendant Neal's process patent application which was purchased by Citrus Patents and which is claimed by plaintiffs. The plaintiffs filed the original suit claiming title to the Neal application by virtue of an alleged 1935 oral agreement (R. 3) between Neal and the State Board of Control under which Neal allegedly agreed to assign his application and to which agreement the corporate defendants were alleged to have notice (R. 5). *This 1935 oral agreement and notice of it were the basic issues up to and during trial.*

5. At the close of the evidence, plaintiffs moved to amend the complaint so that it would allege *that Neal was employed to invent* (R. 293-94). This motion, if allowed, would raise *two new issues, namely: an employment contract binding Neal to assign; and notice of it* (see notice allegation, R. 5). The Chancellor deferred his ruling on the motion until he had reviewed the evidence and marked it "Presented for filing" (R. 294).

6. The Chancellor found, as matters of fact: *first*, Neal was not employed to invent (R. 28); *second*, he had not made any agreement to assign to plaintiffs, the 1935 oral agreement being, if anything, a contract to make a future agreement (R. 28); and *third*, Citrus Patents was a bona fide purchaser for value without notice because, having made inquiry of plaintiffs as to plaintiff's interest in Neal's application, it was lead to believe that, as against plaintiffs, Neal could give a good title and then acted and relied upon such information (R. 28). *The Chancellor therefore denied plaintiff's motion to amend and dismissed the complaint* (R. 30).

7. On appeal, the Florida Supreme Court reversed the Chancellor, holding in effect:

- (a) that while Neal's employment was, in its inception, general, it became a specific contract to invent in August, 1933, when project 239¹ was set up under the (unpleaded) Purnell Act and Neal placed in charge of it (R. 308); and
- (b) that while Citrus Patents relied upon the misleading statement of the Experiment Station's director "who said in substance that they had nothing more than a gentleman's agreement with Dr. Neal and that if he repudiated that, appellants (plaintiffs) had no way to enforce it," Citrus Patents nevertheless purchased Neal's application with notice of plaintiff's interest (R. 310).

8. Separate petitions for rehearing, filed by the corporate defendants (R. 310-13) and by Neal (R. 314-31), were denied by order of April 13, 1943 (R. 331), when the court forwarded its mandate to the Circuit Court directing it "*to enter an appropriate decree for the appellants*" (*plaintiffs*). Neal's subsequent motion for leave to file a second petition for rehearing (R. 331-33) accompanied by such petition (R. 333-38) was denied by order of May 3, 1943 (R. 339). Defendant corporations' second petition for rehearing (R. 339-41) was granted by order of May 25, 1943, the court amending both opinion and mandate by adding the following clause: "*He is further directed to enter such decree as justice and equity may require as to Louisville Drying Machinery Company, and as affecting it*"

¹The evidence established: that the Experiment Station conducted "State sponsored" and "Federally sponsored" projects (R. 42, 249-252); and that project 239, while pleaded as an Official project (R. 2), was, in fact, a Purnell (Federally sponsored) project under an "unpleaded" Act of Congress identified solely as a Purnell Act (R. 140).

and Wayne M. Neal and Citrus Patents Company (R. 341-42).

Defendant corporations' subsequent application for permission to file a third petition for rehearing (R. 342-43) accompanied by such petition (R. 343-46) was denied by order of June 7, 1943 (R. 348-49).

REASONS RELIED UPON FOR ALLOWANCE OF WRIT.

1. This case presents expressly raised, and necessarily raised, Federal questions under the Purnell Act of Congress which have not heretofore been determined by this court.

The *expressly raised* questions involve the effect to be given: *the Purnell Act* in determining whether or not an Experiment Station employee is employed under a general or specific contract when assigned to a Purnell project; *the use of Purnell Funds*, by an Experiment Station to pay the expense of patenting Purnell inventions, in determining whether or not an Experiment Station employee-inventor, is employed under a general or specific contract when assigned to a Purnell project; *and notice of the Purnell Act* in charging a stranger with notice of an employment contract under it. These questions are substantial since the whole case depends upon them.

The *necessarily raised questions* involve the *right of an Experiment Station* or the State interests it represents: *to receive assignments* of Purnell inventions under the Purnell Act as against such right of the Federal interests which administer the Act and furnish Purnell Funds under it; *and to hold Purnell inventions* for their personal benefit without dedicating them to the public at large. These ques-

tions are substantial, first, since they affect the operations of all Experiment Stations in the United States and its territories under the Purnell Act and, second, since they have a vital effect upon the national interests of all citizens of the United States because they deal with the right of such citizens to use Purnell inventions on an unrestricted and royalty-free basis as against the right of either or both an Experiment Station and the State interests it represents to appropriate the invention and charge a royalty for, or place any other conditions upon, its use by citizens of the United States.

2. This case also presents an expressly raised Federal question of substance decided in a way probably not in accord with applicable decisions of this court.

The question raised involves the due process (property) clause of the 14th Amendment of the United States Constitution, since the effect of the decision is to *deny* your corporate petitioners a *hearing* by adjudicating an “*issue*” neither joined in the pleadings nor supported by the evidence. A reversal of the decision on this point necessarily involves a reversal of that portion of the judgment which decrees away the title of defendant corporations in the Neal application.

PRAYER.

Wherefore your petitioners respectfully pray: that a writ of certiorari be issued by, and under the seal of, this Honorable Court, and directed to the Supreme Court of Florida commanding that court to certify, and to send to this court for its review and determination, on a day certain to be therein named, a certified transcript of the record and proceedings herein; that the judgment of the Supreme Court of Florida be reversed by this Honorable Court; and

that your petitioners have such other and further relief in the premises as may seem meet and just.

WAYNE M. NEAL,
LOUISVILLE DRYING MACHINERY COMPANY, AND
CITRUS PATENTS COMPANY,

Petitioners,

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Supreme Court of the United States

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v.

STATE OF FLORIDA; THE STATE BOARD OF
EDUCATION OF FLORIDA; AND STATE
BOARD OF CONTROL.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINION OF THE COURT BELOW.

1. The *original* opinion of the Florida Supreme Court is reported at 57 U. S. P. Q. 175, while the *amended* opinion is reported at 12 So. (2d) 590 and printed at pages 306-10 of the record.

JURISDICTION.

1. Jurisdiction of this court is invoked under Section 237 of the Judicial Code as amended [28 U. S. C., Sec. 344 (b)].

2. Jurisdiction is invoked by virtue of the federal questions expressly and necessarily raised, under the Purnell Act and the due process clause of the Fourteenth Amendment of the United States Constitution, by the final decision of the highest court of the State of Florida. The Purnell Act, 43 Stat. 970, c. 308, Sections 1-6, is printed in the appendix hereto. The final decision refers only to Section 1 of the Act. This section appropriates, "*for the more complete endowment and maintenance of Agricultural Experiment Stations,*" annual sums to be "*applied only to paying the necessary expenses of conducting investigations or making experiments bearing directly on the production, manufacture, preparation, use, distribution, and marketing of agricultural products and including such scientific researches as have for their purpose the establishment and maintenance of a permanent and efficient agricultural industry, and such economic and sociological investigations as have for their purpose the development and improvement of the rural home and rural life, and for printing and disseminating the results of said researches.*" While the other sections of the Act are not referred to in the decision, it may be noted that the Secretary of Agriculture is, in Section 4, "charged with the proper administration of this law."

3. The court's original opinion, (R. 306-10) is dated March 23, 1943. This opinion or decree was amended May 25, 1943 (R. 341-42), the amended decree being the final decree from which time to file this petition is reckoned. *United States v. Gomez*, 1 Wall. (68 U. S.) 690; *Providence Rubber v. Goodyear*, 6 Wall. (73 U. S.) 153; *Gypsey Oil Co. v. Escoe*, 275 U. S. 498; *Bowman v. Loperena*, 311 U. S. 262. The time to file this petition was successively extended to and including September 15, 1943, and September 30, 1943, respectively, by the orders dated August 12, 1943

(R. 351), and September 7, 1943,¹ of the United States Supreme Court.

4. This case involves the title to Neal's United States Patent Application which was purchased by Citrus Patents and which is claimed by plaintiffs, Neal's employers. The whole case turns upon the following: *first*, was Neal obligated to assign by virtue of an employment contract? and, *second*, did the defendant corporations have a hearing on the notice issue respecting such contract?

The rulings of the Florida court which bring this case within the jurisdiction of this court are as follows:

- (a) an employment contract, obligating Neal to assign, is established by the language of Section 1 of the Purnell Act (R. 308);
- (b) the payment of patent expenses out of Purnell funds is conclusive evidence of such contract (R. 309);
- (c) notice of the Purnell Act is sufficient to charge defendant corporations with notice of plaintiff's rights in the Neal application (R. 310); and
- (d) defendant corporations had direct notice of the federally-based employment contract (R. 310) (this holding being based on a "notice issue" which: was not joined in the pleadings during trial; was before the Florida Supreme Court only on denial of plaintiff's motion, made at the conclusion of trial, to amend the pleadings to conform to the evidence; and was unsupported by any evidence in the case).

¹The order of Sept. 7, 1943 is printed in the Appendix hereto.

5. Representative cases believed to sustain the jurisdiction of this court, respecting (a) the rulings on the Purnell Act and its effect and (b) the ruling on direct notice of the contract, are as follows:

- (a) Frost Co. v. Cour D'Alene Mining Corp., 312 U. S. 38, 85 L. E. 500, 61 S. C. 414,
 State of Indiana v. Brand, 303 U. S. 95, 82 L. E. 685, 58 S. C. 443,
 Cissna v. Tennessee, 246 U. S. 289, 62 L. E. 720, 38 S. C. 306,
 Dewey v. Des Moines, 173 U. S. 193, 43 L. E. 665, 19 S. C. 379,
 United States v. Shelby Iron Co. of N. J., 273 U. S. 571, 71 L. E. 781, 47 S. C. 515; and
- (b) Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U. S. 673, 74 L. E. 1107, 50 S. C. 451,
 Saunders v. Shaw, 244 U. S. 317, 61 L. E. 1163, 37 S. C. 638,
 Reynolds v. Stockton, 140 U. S. 254, 35 L. E. 464, 11 S. C. 773,
 Postal Telegraph Cable Co. v. Newport, Ky., 247 U. S. 464, 62 L. E. 1215, 38 S. C. 566.

STATEMENT OF THE CASE.

Fact Background.

1. *Neal's employment*—In 1929 Neal was employed¹ as assistant in animal nutrition at the Experiment Station of the University, his employment being general (R. 28, 306) and his salary coming exclusively from Purnell Funds (R. 149, 248-49, Neal Exhibit 12), and on *August 31, 1933*, the Experiment Station set up (R. 142), and placed Neal in charge of (R. 143), official project 239 to investigate the cattle feeding value of *dried* citrus waste, *i. e.*, refuse from grapefruit and orange canning factories (R. 306-07). This project was entitled "The Digestibility Coefficients And Feeding Value Of Dried Grapefruit (And Dried Orange) Refuse" and its object was "To determine the coefficients of digestibility of the nutrients contained in commercially-dried grapefruit refuse and their value in feeding dairy cows (Plaintiff's Exhibit 1).

2. *Neal's invention*—In 1935, while conducting experiments (R. 2-3, 7) pursuant to project 239 Neal became interested in the problem of processing citrus waste to eliminate moisture therefrom and, *in August, 1935*, announced (R. 2-3, 7) to Dr. Newell (R. 47-49) his July, 1935 discovery of a process of chemically treating (R. 157, 226, 230, 254-55) wet citrus waste which facilitated the well-known drying operations necessary in manufacturing the raw waste into a dried feed.

3. *1935 Oral agreement*—On *August 13, 1935*, Neal filed (R. 49) application Ser. No. 36,035, to patent the

¹Neal admits (R. 249) that Plaintiff's Exhibit 79 correctly states his duties on March, 1934 and he testifies as to his original duties (R. 247-48) and his project 239 duties (R. 248). For similar testimony by others, see R. 43-45, 142-144. Both Courts say his original employment was general employment (R. 27-28, 306).

method under an *oral arrangement* made with the Experiment Station wherein the Experiment Station was to, and did, pay, from State (not federal) funds (R. 165, 171), the expense incident to filing and prosecuting the aforesaid Neal application while Neal was to assign the patent to the State Board of Control if and when secured (R. 2-3, 9-10). Neal claims that the oral arrangement looked toward a future agreement under which he would assign and be compensated (R. 262, 267, 268, 275).

4. *Neal interference*—In (November) 1938 the United States Patent Office declared an interference between Neal's aforesaid application and other similar applications respectively owned by Louisville Drying and California Fruit Growers Exchange, a California corporation of Los Angeles, California, hereinafter designated "Exchange" (R. 4, 17, 23, 74, 202-204). In this interference Neal was the senior party while Louisville Drying and Exchange were the junior parties.

5. *Louisville Drying negotiation*—In July, 1940 both junior parties, *assuming*¹ (R. 202, 204-05) that Neal's application was owned by the University, *opened* (R. 203) negotiations with the Experiment Station (R. 75-77, 111-112, 186-89, 202-06) to settle the interference and *submitted* (R. 77) a settlement proposal (Plaintiff's Exhibit 51) under which the junior parties would agree to concede priority to Neal and give the Experiment Station all rights east of the Mississippi River under their respective "citrus waste" patents and patent applications in return for certain rights under Neal's application (as plead at R. 4, 17-19, 23-26).

6. *Termination on representations*—In August, 1940, these negotiations were terminated upon the representa-

¹This assumption was based first on a reference, in the file wrapper of Neal's application, to "applicant's assignee" (R. 204) and second on an exhibit, forming a part of that file wrapper, marked "Submitted by Wilmon Newell" (R. 205) who was the Director of the Experiment Station.

tions: *1st of Neal* (R. 189-90, 207, 209-10, 218) who offered to sell the application to Louisville Drying *saying* that he owned it, was under no legal obligation to assign it to the Experiment Station although he had had conversations with the Experiment Station looking toward an agreement involving assignment by him and compensation by it and would not assign it unless compensated; and *2nd of Dr. Newell* (R. 83-85, 88, 112-118, 192-196, 210-213) *who*, being informed of Neal's statement by Lissauer, President of Louisville Drying, *stated* (R. 116) that the Experiment Station would not compensate Neal and *mislead* Lissauer (R. 310) into the belief that Neal could give a good title by saying that the Experiment Station had nothing more than a gentleman's agreement with Neal and if Neal repudiated that, the Experiment Station had no way to enforce it, and *who*, at Lissauer's suggestion (R. 118, 194-95, 212-13), *conferred with Neal in a further and final attempt to secure an assignment and thereupon telegraphed Lissauer* (Def. Corp.'s Exhibit 3) *that Neal would not assign* (as plead at 19-20, 24-26).

7. *Citrus Patents purchase*—In September, 1940, Lissauer, relying on such information, withdrew the proposal (Plaintiff's Exhibit 51) by telegram (Plaintiff's Exhibit 63), incorporated Citrus Patents (R. 186) and caused it to purchase Neal's application on September 13, 1940 (R. 28, 213, 217, 219, 221, 310).

Pleadings.

8. *The complaint* (R. 1-6), filed in December, 1940, together with the separate answers of Neal (R. 6-14) and of the corporate defendants (R. 15-20, 21-27), in setting forth the background facts, established, *as basic issues, the 1935 oral agreement and notice thereof*. It is noted that the

complaint did not allege and the other pleadings did not establish:

- (a) that project 239 was in fact a Purnell project carried out under the Purnell Act and paid for with Purnell (Federal) funds derived under the Act; or
- (b) that Neal's obligation to assign arose from any employment contract, whether it be employment under the Purnell Act or otherwise.

Trial and Evidence.

9. The cause was tried before the Chancellor himself with the evidence:

- (a) establishing *Neal's employment* (R. 43-45, 142-44, 152, 247-49, Plaintiff's Exhibits 1 and 79) *and invention* (R. 47-50, 157, 226, 230, 254-55) as stated;
- (b) conflicting as to whether or not the *1935 oral agreement* was an *enforceable agreement* obligating Neal to assign or an *unenforceable agreement* to make a future agreement under which Neal would assign and be compensated therefor, the evidence preponderating as to the future agreement (R. 50, 82, 97-105, 110, 119-23, 159-60, 176, 211-12, 236, 241, 262, 267-68, 275); and
- (c) establishing the *interference* (R. 74, 202-04), *negotiation* (R. 75-77, 111-12, 186-89, 202-06), *termination on representations* (R. 83-85, 88, 112-118, 189-96, 207-13, 218) and *purchase* (R. 213-21) as stated.

10. The evidence also established:

- (a) that the Experiment Station conducted "State sponsored" and "Federally sponsored" projects (R. 42, 249-252);

- (b) that project 239, while pleaded as an Official project (R. 2), was, in fact, a Purnell (Federally sponsored) project under an (unpleaded) Act of Congress identified, in the testimony, simply as a Purnell Act (R. 96, 140);
- (c) that Neal made the invention during the time he was employed on that project (R. 249); and
- (d) that the patent expenses¹ were paid from State, not Federal, funds (R. 165, 171).

But there was a complete absence of evidence showing or suggesting that either or both Louisville Drying and Citrus Patents had any notice of these facts.

Plaintiff's Motion to Amend.

11. At the conclusion of the evidence, plaintiff, "to clarify the pleadings," moved to amend the complaint so that it would allege that Neal "was employed as aforesaid to develop and discover the said process or method" (R. 293-94). An allowance of this motion would set up two new issues namely: *an employment contract*; and *notice of it*, the original notice allegation (R. 5) being broad enough to apply to such contract. Since the Chancellor could not properly allow this motion unless it made the pleadings conform with the evidence, he deferred his ruling on the motion until he had reviewed the evidence and marked it "Presented for filing" (R. 294).

¹See Plaintiff's Exhibits Nos. 65-71, 73-74 and 78 showing that such expenses were paid out of State, not Federal, funds.

Chancellor's Findings of Fact.

12. The Chancellor incorporated the following findings of fact in his decree of August 7, 1942:

- (a) The defendant, Wayne M. Neal, was employed by the Agricultural Experiment Station of the University of Florida, at Gainesville, Florida, and was in its employ for year beginning July 1, 1935, and ending June 30, 1936. His title was "Associate in Dairy Nutrition." The employment of the defendant, Neal, was under a general contract of employment, and was never at any time a contract to invent or discover the process that was discovered by him in July, 1935. The process discovered by him was one for elimination of moisture from citrus waste so that such waste could be used in the manufacture of cattle feed (R. 27-28).
- (b) No agreement was made by the said Wayne M. Neal to assign the process discovered, to the plaintiffs, or either thereof. If the understanding of the parties amounted to anything, it only amounted to an agreement to make a contract in the future (R. 28).
- (c) The defendant, Wayne M. Neal, did not at any time hold the title to the process discovered by him in trust for plaintiffs or either thereof (R. 28).
- (d) The defendant, Citrus Patents Company, purchased the legal title to the application of defendant Wayne M. Neal for a patent to the process discovered by him, which carried with it all the rights of the inventor (R. 28).

- (e) The defendant, Citrus Patents Company and its organizers, had implied actual notice that the plaintiffs might have a property interest in the Neal discovery or process, and hence were put on inquiry as to the extent of their interest, if any.

The defendant, Citrus Patents Company and its organizers, satisfied that duty, and made "reasonable inquiry" in their efforts to ascertain the extent of the plaintiffs' interests. The defendant, Citrus Patents Company, was a bona fide purchaser for value without notice.

Furthermore, the organizers of Citrus Patents Company made inquiry of plaintiffs as to any interest they might have in Neal's application, and upon such inquiry was led to believe that as against plaintiffs, Neal could give a good title; that Citrus Patents Company acted and relied upon such information (R. 28).

The Chancellor also incorporated additional findings (R. 28-30) showing: that up to September, 1940, plaintiffs had expended \$1,202.66 in connection with the Neal application; that in September, 1940, plaintiffs informed Neal that the sum expended was \$1,064.06, but refused reimbursement by Neal of this sum; that Neal thereupon deposited \$1,500 in escrow to reimburse plaintiffs; and that plaintiffs are entitled to full reimbursement with interest on the difference between \$1,202.66 and \$1,064.06.

Thereupon the Chancellor dismissed both plaintiffs' motion to amend and plaintiffs' complaint (R. 30).

Reversal by the Florida Supreme Court.

13. The Supreme Court of Florida reversed the Chancellor. In doing so, it impliedly affirmed the Chancellor's holdings on the 1935 oral agreement and notice issues but *treated the complaint as if it were amended to include the employment contract allegation (R. 307) presented in plaintiff's motion to amend.* So treated, the court considered the pleadings as presenting an "employment contract issue" and a "notice issue" respecting such contract (R. 307).

14. With respect to such "*employment contract issue*," the court held:

- (a) that "The contract of employment was, in its inception, general, but when Project No. 239 was set up under the Purnell Act and Dr. Neal placed in charge, it was from that time hence for the express purpose of accomplishing the result that was accomplished . . . the invention in question was the product of Dr. Neal's contract of employment and . . . it inured to his employer" (R. 308).

15. The court based this holding squarely upon the Purnell Act itself, saying:

- (a) that a specific contract was supported by "The Purnell Act of Congress, under which Project No. 239 was set up, limits allotments to the State to pay the expense of '*conducting investigations or making experiments bearing directly on the production, manufacture, preparation, use, distribution, and marketing of agricultural products and including such scientific researches as have for*

their purpose the establishment and maintenance of a permanent and efficient agricultural industry' " (43 Stat. 970, c. 308, Sec. 1; 7 U. S. C. 370) (R. 308);

- (b) that "One of the most conclusive proofs of this (contract) is the fact that the Experiment Station paid all the expense of securing the patent, including Dr. Neal's expenses to Washington for that purpose, from the Purnell Fund" (R. 309); and
- (c) that "notice of the Purnell Act and its purpose . . . was sufficient" to charge Citrus Patents with notice of plaintiff's rights (R. 310).

16. The court also found support for the employment contract in specified items of conduct by the contracting parties (R. 308-09). However, since the contract is dated by the court as of August 31, 1933, and since the conduct specified was subsequent to that date, it becomes apparent that the conduct specified is relied upon by the court as indicating an awareness by both parties of a contract based on the Purnell Act.

17. With respect to the *employment contract notice* "issue," the court held:

- (a) "On the question of whether or not Citrus Products (Patents) Company was a purchaser in due course without notice, it appears that reliance is placed primarily on a conversation they had with the director of the Experiment Station who said in substance that they had nothing more than a gentleman's agreement with Dr. Neal and that if he repudiated that, appellants (plaintiffs) had no way to enforce it. This was a misleading statement but there were plenty of red flags flying to

warn appellees (defendant corporations). The Contract between the Experiment Station and Dr. Neal was the determinative answer to this question and the record shows that appellees were *on notice of this contract*. They were also *on notice of the Purnell Act and its purpose*. *Either of these factors was sufficient answer to this question* so we do not deem it necessary to labor the opinion with further discussion of the question of notice" (R. 310).

18. Obviously the court based this holding of notice on the theory that notice of either the Purnell Act or the 1933 employment contract was sufficient to charge Citrus Patents with notice of plaintiff's contract rights under the Purnell Act, and that Citrus Patents had notice of both the Act and the employment contract.

19. The first (April) rehearing petition filed by defendant corporations (R. 310-13) after the original opinion and before the mandate issued, called the court's attention to the complete absence of evidence to support the employment contract notice "issue" which was before the court only on the denial of plaintiff's motion to amend. Neal's first petition (R. 314-31), filed before the mandate issued, not only called attention to the fact that the original suit was based on the 1935 oral agreement and not on an employment contract, but together with his second petition (R. 333-38), filed before the opinion was amended, called attention to the court's unwarranted construction of the Purnell Act, as did the third petition of the defendant corporations (R. 343-46) filed after the court amended the opinion in response to defendant corporations' second rehearing petition (R. 339-41).

SPECIFICATION OF ERRORS.

20. If the writ of certiorari be issued, petitioners desire to argue that the Supreme Court of Florida, with respect to the Purnell Act and the 14th Amendment of the Federal Constitution, erred as follows:

With respect to the Purnell Act

- 1st, in holding that Neal's employment became, by virtue of the language contained in Section 1 of the Purnell Act, a specific contract to invent in August, 1933, *when* Project No. 239 was set up under the (unpleaded) Purnell Act and Neal placed in charge of it (R. 308),
- 2nd, in holding that one of the most conclusive proofs of such specific employment contract is the fact that the Experiment Station paid all of Neal's patent expenses from the Purnell fund (R. 309),
- 3rd, in holding that the notice of the Purnell Act and its purpose was notice of plaintiff's specific employment contract rights under it (R. 310),
- 4th, in holding that the title to Neal's Purnell invention inured to his employers, the Experiment Station and the State interests it represents (R. 309), and in failing to hold that it inured to the Federal interests which administer the Act and furnish Purnell funds under it, and
- 5th, in permitting Neal's employers to hold Neal's Purnell invention for their personal benefit without dedicating it to the public at large; and

With respect to the Fourteenth Amendment

- 6th, in holding that the corporate defendants generally and Citrus Patents specifically had notice of Neal's

federally based specific employment contract, i. e., the 1933 contract based on and arising under the Purnell Act of Congress (R. 310), when the notice "issue" respecting such contract, on which plaintiffs would have the burden of proof, was not joined in the pleadings during trial, was before the highest court only on appeal from the denial of plaintiff's motion made at the close of trial to amend the pleadings, and was totally unsupported by any evidence whatsoever in the case.

ARGUMENT.

Summary.

1. The Supreme Court in dating Neal's alleged contract to invent as of August 31, 1933, and in ruling directly upon the effect of the Purnell Act respecting such contract, based the existence of the contract squarely on the Purnell Act and not upon *either* the language of the project as it stood on August 31, 1933, *or* the acts occurring subsequent to that date, such as the verbal amendment of the project and the conduct of the contracting parties. (Preliminary.)
2. Neal's duties under his general employment contract remained unchanged when the alleged specific contract was created; hence his employment remained general and did not become specific. (First error assignment.)
3. The use of Purnell funds to pay patent expenses on Purnell inventions is evidence only of a violation of the Purnell Act since the language of that Act specifically limits the use of such funds to the payment of expenses incurred in conducting specified types of research and experiment. (Second error assignment.)

4. Notice of the Purnell Act is not notice of a private contract to invent under the Act because the Act contains no reference to any such contract. (Third error assignment.)

5. If Neal be obligated to assign, by virtue of a contract to invent based on the Purnell Act, then the assignment should extend *either* to the Federal interests which furnished Federal money to pay for the research leading to the invention, *or* to plaintiffs under conditions requiring them to dedicate the invention to the public for the benefit of all citizens of the United States, since those citizens, in passing the Act and providing funds for it, obviously did so for their own benefit and not for the personal benefit of plaintiffs. (Fourth and fifth error assignments.)

6. The Supreme Court's holding that defendant corporations had notice of Neal's contract to invent is arbitrary and unjust because it concludes a point upon which defendant corporations have not been heard and have had no occasion for a hearing, the opportunity for a hearing being an essential requisite of due process. Furthermore, the rule, that pleadings may be treated as amended on appeal to sustain a judgment, should not be invoked to reverse a judgment, particularly where, as here, it results in an injustice. (Sixth error assignment.)

Preliminary.

Since the courts below have referred to several different factors, in their discussions of the general or specific nature of Neal's employment, it should be helpful to consider them in a preliminary way in order to eliminate those which do not contribute to the contract to invent and to establish the Federal or State nature of those which do. Both courts agree that Neal's original employment was general and remained so at least until August 31, 1933, *when* project 239 was set up. Consequently, if Neal were

ever employed to invent, his employment would fall under the general proposition of law that general employment with an invention resulting from the setting of the employee upon a specific problem in the course of and as a part of that employment will, *if sufficiently specific*, raise in the employee the obligation to assign the invention. Ellis on "Patent Assignments and Licenses," 1936 Ed., p. 133; Goodyear Tire & Rubber Co. v. Miller, 22 F. (2d) 353, 9th C. C. A.; Houghton v. United States, 23 F. (2d) 386, 4th C. C. A. Accordingly, defendants concede that Neal's general employment *could* have become a specific contract to invent:

- (a) on August 31, 1933, *when* project 239 was set up, if the language of the project were sufficiently specific (first factor); or
- (b) between August 31, 1933, and July, 1935 (his invention date), if the project were amended by verbal instructions to Neal of a sufficiently specific character (second factor).

The language of project 239 (Plaintiff's Exhibit 1) is obviously of a very general nature while *the substance of that project is directed to the analyses of dried feed to determine its food value and not to a method of chemically treating raw waste which facilitates drying the waste by old drying methods*. The project was amended by verbal instructions in December, 1934, or January, 1935, when Dr. Hume, Neal's superior, instructed him to "*look into methods of drying*" (R. 136), whereas the invention resides in a chemical treatment of raw wet citrus waste which decreases the amount of water to be evaporated from the waste and renders the waste easier to dry by old and well known methods of drying (Plaintiff's Exhibits 5, 6). The Chancellor considered both of these factors and found the

employment general (R. 27-28). The Supreme Court considered them both (R. 306-07) but did not base the contract to invent on either. The Supreme Court found that Neal's employment became a specific contract to invent *when* the project was set up and Neal placed in charge of it (R. 308). Both of the acts occurred on August 31, 1933; hence the contract to invent is dated August 31, 1933. The language of the project is not referred to as a basis for the contract while the verbal amendment of the project occurred a year and a half after the date of the contract.

A *third factor* is the Purnell Act. The Supreme Court based the contract to invent squarely upon this Act by ruling: that a specific contract was supported by the language of Section 1 (R. 308); that the payment of the patent expenses out of the Purnell funds was conclusive proof of the existence of the contract (R. 309); and that notice of the Act alone was sufficient to charge Citrus Patents with notice of the contract (R. 310). *The court thus expressly construed and gave effect to a federal act*; hence it is irrelevant to inquire how and when the federal question was raised. Robertson and Kirkham's "Jurisdiction of the Supreme Court of the United States," 1936 Ed., Sec. 77, page 130. A federal question is expressly raised where a State court's decision, respecting a private contract, is based wholly on the interpretation and application of a Federal Act. *Frost Co. v. Cour D'Alene Mining Corp.*, 312 U. S. 38, 85 L. E. 500, 61 S. C. 414; *Awotin v. Atlas Exchange Bank*, 295 U. S. 209, 79 L. E. 1393, 55 S. C. 674.

A *fourth factor* is the conduct of the contracting parties subsequent to, and therefore under, the 1933 contract to invent. The Supreme Court refers to specified items of conduct (R. 308-09) saying that such conduct after August 31, 1933, supports their conclusion that a contract to invent was created on August 31, 1933. From this it becomes clear, that the conduct of the parties is not relied upon to

establish a contract *independent of the Purnell Act* but it is relied upon as showing the existence of a contract *dependent on the Purnell Act*.

From the foregoing, it becomes evident that the Florida Supreme Court relied upon: the Purnell Act (3rd factor) as creating a specific contract to invent; Project 239 (1st factor) as dating that contract; and the verbal amendment of the project (2nd factor) together with the conduct of the parties subsequent to August 31, 1933 (4th factor) as subsequent acts corroborating the conclusion that such contract was in existence. Thus all factors, except the third, are eliminated.

Before passing, we note that the elimination of all but the third factor, the Purnell Act, places the Supreme Court's decision squarely upon federal grounds and not upon non-federal grounds. *A decision, which might have been rested on non-federal (res judicata) grounds but which actually is based upon federal grounds, is reviewable by the United States Supreme Court.* State of Indiana v. Brand, 303 U. S. 95, 82 L. E. 685, 58 S. C. 443; Henderson Bridge Co. v. City of Henderson, 173 U. S. 592, 43 L. E. 823, 19 S. C. 553. While the court rested its decision on federal grounds not asserted by either party, the fact that it expressly construed and gave effect to a federal act appears to be sufficient to give this court jurisdiction. Cissna v. Tennessee, 246 U. S. 289, 62 L. E. 720, 38 S. C. 306; Meidreich v. Lauenstein, 232 U. S. 236, 58 L. E. 584, 34 S. C. 309. But even if it were not, this court would have jurisdiction since the defendants called the court's attention to the fact that it had misconstrued and gave unwarranted effect to the Act on petition for rehearing, which was the *first opportunity* so to do. Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U. S. 673, 682, 74 L. E. 1107, 1114, 50 S. C. 451, 455; Missouri v. Gehner, 281 U. S. 313, 74 L. E. 870, 50 S. C. 326. Since the Purnell Act was *not pleaded*,

not clearly identified in the testimony, not mentioned in the Circuit Court's decision and not affirmatively relied upon by either party before either the Circuit Court or the Supreme Court of Florida, there was no way of anticipating that the Supreme Court would base its decision on this unexpected ground; hence this court should take jurisdiction under the rule governing "surprise" cases. Saunders v. Shaw, 244 U. S. 317, 320, 61 L. E. 1163, 37 S. C. 638.

First Assignment of Error.

This assignment raises a question which may be stated as follows:

- (a) *Where an Experiment Station employee, while employed under a general contract, is assigned to a generally worded Purnell project conducted by the Experiment Station under the Purnell Act, does the general employment contract become, at the time of the Purnell project assignment, by virtue of the language of the Purnell Act itself, an express or specific employment contract binding the employee to assign all Purnell inventions, i. e., inventions which relate to the project and which are made by him while working on the project?*

Neal's original employment in 1929 was as a laboratory worker, to engage in the analyses of blood, tissue, feed stuffs, etc. (R. 249, Plaintiff's Exhibit 79). Both courts below agree that this employment was general (R. 27-28, 306). General employment requires no assignment of inventions to the employer. *Hapgood v. Hewitt*, 119 U. S. 226, 30 L. E. 369, 7 S. C. 193; *Solomon v. United States*, 137 U. S. 342, 34 L. E. 667, 11 S. C. 88; *Dalzell v. Dueber Mfg. Co.*, 149 U. S. 315, 37 L. E. 749, 13 S. C. 886; *Gill v. United States*, 160 U. S. 426, 40 L. E. 480, 16 S. C. 322.

To set up a contract to invent on August 31, 1933, it must be shown that Neal's duties were changed, at that time, sufficiently to charge him with employment to invent a method of chemically treating the raw waste which would facilitate the drying operation so necessary in manufacturing it into a dried feed. *Houghton v. United States*, 4th C., 23 F. (2d) 386; *Solomon v. United States*, *supra*; *Gill v. United States*, *supra*; *Standard Parts Co. v. Peck*, 264 U. S. 52, 68 L. E. 560, 44 S. C. 239.

The general nature of Neal's duties were not changed by the Purnell Act or Project 239 because, in conducting that project under that Act, his specific project duties were to make arrangements for feeding *dried waste* to cattle and to arrange for the records to be kept, the samples of feed taken, the analyses of these samples, and the calculation, and from the results of these analyses, of the actual feed value of the dried waste (R. 248-9). In fact, Neal's superior, Dr. Shealey, wrote Neal in March, 1934, that his duties *then* were those of a laboratory worker engaging in the analyses of blood, tissue, feed stuffs, etc. (Plaintiffs' Exhibit 79). Furthermore, the project itself, Plaintiffs' Exhibit 1, related to the feed value of the feed and not to a chemical treatment of the raw waste; hence was in line with his general employment as a laboratory worker.

No case has been found in which the existence of a specific employment contract is based upon a Federal Act. *In this connection it is submitted that the Purnell Act cannot properly be used as a basis for a contract to invent; first, because its language is too general; and, second, because Congress manifested no such intention. The Act makes no mention of, or provision for, employment contracts or inventions.*

The law applicable to private employers determines the right of a government to the inventions of its employees, *United States v. Dubilier Condenser Corp.*, 289 U. S. 178,

77 L. E. 1114, 53 S. C. 554; hence determines plaintiffs' rights herein either as private employers or governmental agencies.

The Florida Supreme Court did not rule that the verbal amendment to the project in December, 1934, or January, 1935, rendered Neal's employment specific. It did rule that such verbal amendment supported its conclusion that the contract became specific on August 31, 1933, when the project was set up. Since it is clear that the contract did not and could not become specific on August 31, 1933, it appears to be desirable to give some consideration to the character of the verbal amendment.

The Florida Supreme Court, in referring to such verbal amendment, stated that Neal "was instructed to conduct the research with the view of developing a better method" (R. 308). This statement, broadly speaking, is true, but the character of the research Neal was instructed to conduct did not embrace his invention or otherwise render his employment specific. This is manifest from Dr. Hume's testimony wherein he stated that in December, 1934, or January, 1935, he instructed Neal to "*look into methods of drying; and to that end to find out what was being done in the drying of brewery waste, of apple pomace and beet pulp, and what was the process being used to put those things on the market*" (R. 136). Obviously this instruction or amendment entailed only a determination of the machines and processes which were then used on other materials and which might be suitable for use on citrus waste. Dr. Hume did not suggest that Neal should try to develop a distinctly new drying means or a distinctly new drying method and certainly his instructions did not even remotely suggest that Neal should attempt to develop a new *chemical method of treating citrus waste*. Dr. Hume's verbal amendment of Project 239 did not embrace Neal's invention as late as June, 1935, when Neal was on his honeymoon trip,

during which he conceived the invention, since Dr. Hume at that time wrote Neal a letter, Plaintiffs' Exhibit 76, instructing him to "secure all information possible on drying in case we deem it expedient to research the field." Accordingly the defendants assert that the verbal amendment of Project 239, subsequent to August 31, 1933, did not render Neal's employment specific because it was not only generally worded but directed to a field other than the inventive field (R. 46, 136, 143-44, 150-57, 166).

Second Assignment of Error.

This assignment raises a question which may be stated as follows:

- (b) *Is the existence of such a specific contract indicated or proved by the action of the Experiment Station in using Purnell funds to pay the expense incident to patenting Purnell inventions?*

This question is answered in the negative by the express language of Section 1 of the Purnell Act which requires Purnell funds to be applied *only to specified types of research and experiment* (Sec. 1). The use of Purnell funds to pay patent expenses is evidence only of a violation of the Act.

The Florida Supreme Court based its affirmative answer to the above stated Federal question upon its finding that Neal's "expenses in securing the patent, including attorneys' fees, and his expenses to Washington, all amounting to more than \$1,200, were paid from the Purnell fund by the employer" (R. 308). This finding of fact is in direct opposition to plaintiffs' uncontradicted evidence which shows that Neal's patent expenses could not be paid "out of Purnell funds" (R. 171) and, as a matter of fact, were paid out of State funds (R. 171, Plaintiffs' Exhibits

Nos. 65-71, 73-74 and 78). The denial of a Federal right, based on an unsupported finding of fact, presents a reviewable question of law. *Creswill v. Grand Lodge Knights of Pythias of Georgia*, 225 U. S. 246, 261, 56 L. E. 1074, 32 S. C. 822.

Third Assignment of Error.

This assignment raises a question which may be stated as follows:

- (c) *If the general employment contract became specific when the employee is assigned to a Purnell project, is notice of the Purnell Act itself alone sufficient to charge a stranger or third party with notice of such contract?*

The corporate defendants concede that they are charged with constructive notice of the Purnell Act and that notice to Lissauer, President of both defendant corporations, is notice to both corporations.

We have found no case holding that notice of a Federal Act constitutes notice of a private contract. However, for notice of one paper, such as the Purnell Act, to give notice of another paper, such as Neal's employment contract, the first paper must contain a reference to the second, and the reference must indicate that both papers deal with a subject matter to which the inquiry would be relevant. *United States v. Shelby Iron Co. of N. J.*, 273 U. S. 571, 71 L. E. 781, 47 S. C. 515.

The corporate defendants concede that whatever puts a party on inquiry amounts to notice, provided inquiry becomes a duty and would lead to knowledge of the facts by the exercise of ordinary intelligence and understanding, *but the corporate defendants assert that there is nothing contained in the Act to put them on inquiry; hence notice*

of the Act is not sufficient to charge defendant corporations with notice of an employment contract not mentioned in, or otherwise indicated by, the Act.

Fourth and Fifth Assignments of Error.

These assignments raise questions which may be stated as follows:

- (d) *If the employee is contractually obligated to assign such Purnell inventions, does that obligation extend either to the Experiment Station and the State interests that it represents or to Federal interests such as the Secretary of Agriculture who is charged with administering the Act, who furnishes the funds under the Act, and to whom the Experiment Station must account for its operations, receipts, and expenditures on Purnell projects under the Act?*
- (e) *If such obligation to assign extends to the Experiment Station or to the State interests that it represents, can any of these interests hold the invention for its personal benefit or for the benefit of all the citizens of the State in which the Experiment Station is located, or must it dedicate the invention to the public for the benefit of all the citizens of the United States?*

The foregoing questions are necessarily raised by the court's action in permitting plaintiffs to hold an unrestricted title. Furthermore, they may be considered as *related* to the question expressly raised in connection with the first assignment of error, and thus reviewable under the doctrine recognized in *Dewey v. Des Moines*, 173 U. S. 193, 43 L. E. 665, 19 S. C. 379, since they are raised only when the first question is decided in the affirmative and

may, then, be viewed as an enlargement of the first question.

We know of no cases deciding, or even bearing upon, the questions raised but we assert first, that if a Purnell employee, such as Neal, is obligated to assign a Purnell invention, the assignment should extend to Federal interests, such as the Secretary of Agriculture, because he is charged with administering the Act (Sec. 4) under which the project was conducted, and he furnishes Federal funds, under the Act, to pay the expenses of the project (Sec. 1). The Experiment Station, in receiving these funds, must account for its operations, receipts, and expenditures (Sec. 3), and, if they misapply the funds, the State must replace them (Sec. 3), for otherwise the Secretary of Agriculture is authorized to withhold further appropriations under the Act (Sec. 4). Since the Federal Government pays for Purnell inventions, it should receive the assignment of the invention instead of plaintiffs.

But even if the assignment were properly received by plaintiffs, they should not be permitted to hold the invention for their personal benefit or for the benefit of citizens of Florida. They should be required to dedicate the invention to the public for the benefit of all citizens of the United States, since those citizens passed the Act and provided the funds for it and since it is obvious that the Act was passed by all citizens of the United States for the benefit of all citizens of the United States and not for the personal benefit of plaintiffs.

Sixth Assignment of Error.

The question raised by this assignment may be stated as follows:

- (f) *Where a final judgment of the highest court of a state has the effect of depriving a defendant of*

property by holding that such defendant had notice of a federally based employment contract, i. e., one based on and arising under the Purnell Act of Congress, does that holding constitute a deprivation of property without due process of law because that defendant had not the opportunity or the occasion for a hearing on the notice issue, on which the holding was based, since such issue: first, was not joined in the pleadings during the trial; second, was before the highest court only on an appeal from the denial of plaintiff's motion, made at the conclusion of the trial, to amend the pleadings to conform to the evidence; and, third, was totally unsupported by any evidence¹ whatsoever in the case?

During trial: the pleadings did not place in issue either a contract to invent or notice of it; and plaintiff introduced no evidence whatsoever showing, or even suggesting, notice.¹ Until a notice issue was joined in the pleadings, there was no need for evidence on it or even the right to introduce such evidence. Until plaintiffs introduced such evidence, there was no burden upon the defendants to introduce rebutting evidence. *Saunders v. Shaw*, 244 U. S. 317, 61 L. E. 1163, 37 S. C. 638. *Accordingly, up to the end of the trial, the corporate defendants not only did not have any opportunity for a hearing on an issue of this character, but they had no occasion for such hearing and no notice of the necessity for such a hearing. What may not be taken away is notice of the charge and an opportunity to be heard*

¹There is a complete absence of evidence in the record showing that the corporate defendants had notice: (a) of any specific employment contract under the Purnell Act or otherwise; or (b) of Project 239 either as a general project of the Experiment Station or as a Purnell project thereof; or (c) of Neal's employment on that project; or (d) of Neal's making the invention while working on that project; or (e) of the conduct, specified by the Florida Supreme Court, of the contracting parties under that project.

in defense of it. *Snyder v. Massachusetts*, 291 U. S. 97, 78 L. E. 674, 54 S. C. 330.

Since there was no evidence whatsoever respecting notice by the corporate defendants of any employment contract to invent, there was nothing to which the pleadings could be made to conform in regard to such notice; hence the Chancellor properly denied plaintiff's motion to amend at the close of trial in so far as that motion raised the notice issue in question.

The Florida Supreme Court's holding that the corporate defendants had direct notice of a contract to invent, had the effect of depriving Citrus Patents of its property in the Neal application and of depriving Louisville Drying of any interest it might have therein. (We note that Louisville Drying does not claim any such interest, but the Circuit Court, in entering a final decree based on the mandate of the Florida Supreme Court, decreed that Louisville Drying had some unidentified interest in the Neal application which it must give up.)

The first rehearing petitions of the defendants called the court's attention to the fact that the suit was based on the 1935 oral agreement and not upon any employment contract to invent and that the holding on notice was entirely unsupported by the evidence. *Since the matter was before the Supreme Court only on a motion to amend, in order to conform the pleadings to the evidence, the fact that there is no evidence is enough to show there can be no issue.* Under these circumstances, the court's holding on notice and its denial of the petitions for rehearing has the effect of depriving the corporate defendants of property without a hearing in violation of their rights under the due process clause of the 14th Amendment of the Federal Constitution. *Saunders v. Shaw*, 244 U. S. 317, 61 L. E. 1163, 37 S. C. 638.

The opportunity to be heard is an essential requisite of due process of law in judicial proceedings. Postal Telegraph Cable Co. v. Newport, Kentucky, 247 U. S. 464, 62 L. E. 1215, 38 S. C. 566; Simon v. Craft, 182 U. S. 427, 45 L. E. 1165, 21 S. C. 836; Louisville & Nashville R. R. Co. v. Schmidt, 177 U. S. 230, 44 L. E. 747, 20 S. C. 620; Windsor v. McVeigh, 93 U. S. 274, 23 L. E. 914; Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U. S. 673, 682, 74 L. E. 1107, 1114, 50 S. C. 451, 455.

While we recognize that the Circuit Court had jurisdiction of the parties and of the general subject matter here involved, we submit that in the absence of both an issue on notice and evidence on notice, it did not have requisite or specific jurisdiction of the notice subject matter in question. Consequently the Supreme Court could not exercise that jurisdiction and its judgment, to the extent that it did, is void. *"A defect in a judgment, arising from the fact that the matter decided was not embraced within the issue, . . . must avoid . . . (the) judgment . . . A judgment upon a matter outside of the issue must of necessity be altogether arbitrary and unjust, as it concludes a point upon which the parties have not been heard.* 1 Black on Judgments, Sec. 242, 1902 Ed., pp. 358-59. *A decree passing on a question not in issue is void.* Reynolds v. Stockton, 140 U. S. 254, 35 L. E. 464, 11 S. C. 773; Gentry v. United States, 101 F. 51, 8th C.; Merrill v. Rokes, 54 F. 450, 452, 8th C.; Burton v. Platter, 53 F. 901, 905, 8th C.; Taussig's Ex'rs v. Glenn, 51 F. 409, 413, 8th C.

We recognize that where, during trial, evidence is entered without objection on an issue not joined, either the lower court or the appellate court may treat the pleadings as amended and sustain the lower court's judgment to avoid reversal for an immaterial error. However, such rule should not be invoked *to reverse a lower court's judgment on the merits.* United States v. Winkle Terra Cotta,

8th C., 110 F. (2d) 919. And this is particularly true where an injustice may result by preventing the opposing party "from making a full and fair showing on the issue raised by such amendment." *National Refining Co. v. Pennsylvania Petroleum Co.*, 8th C., 66 F. (2d) 914.

But even if it were possible successfully to argue that the Florida Supreme Court properly treated the complaint as amended on appeal to include the 1933 employment contract and notice issues, the question above stated is nevertheless a Federal question because the notice issue is a Federally based issue, since it involves notice of a contract based on a Federal Act as distinguished from a contract based purely on "State" circumstances. The Florida Supreme Court's holding, or finding of fact, on this Federally based issue, is reviewable because it is unsupported by any evidence in the case. *An unsupported finding of fact is reviewable where a Federal right is denied.* *Postal Telegraph Cable Co. v. City of Newport, Kentucky*, 247 U. S. 464, 62 L. E. 1215; *Sou. Pacific Co. v. Schuyler*, 227 U. S. 601, 611, 57 L. E. 662, 33 S. C. 277; *North Carolina R. R. Co. v. Zachary*, 232 U. S. 248, 259, 58 L. E. 591, 34 S. C. 305; *Carlson v. Curtiss*, 234 U. S. 103, 106, 58 L. E. 1237, 34 S. C. 717; *Norfolk & Western Rwy. v. Conley*, 236 U. S. 605, 610, 59 L. E. 745, 35 S. C. 437; *Interstate Amusement Co. v. Albert*, 239 U. S. 560, 567, 60 L. E. 439, 36 S. C. 168.

Since plaintiffs failed to plead or prove notice by defendant corporations of a contract to invent, the judgment of the Supreme Court should be reversed and that court directed to enter a decree for the corporate defendants.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition should be allowed and the judgment of the Supreme Court of Florida reviewed and reversed.

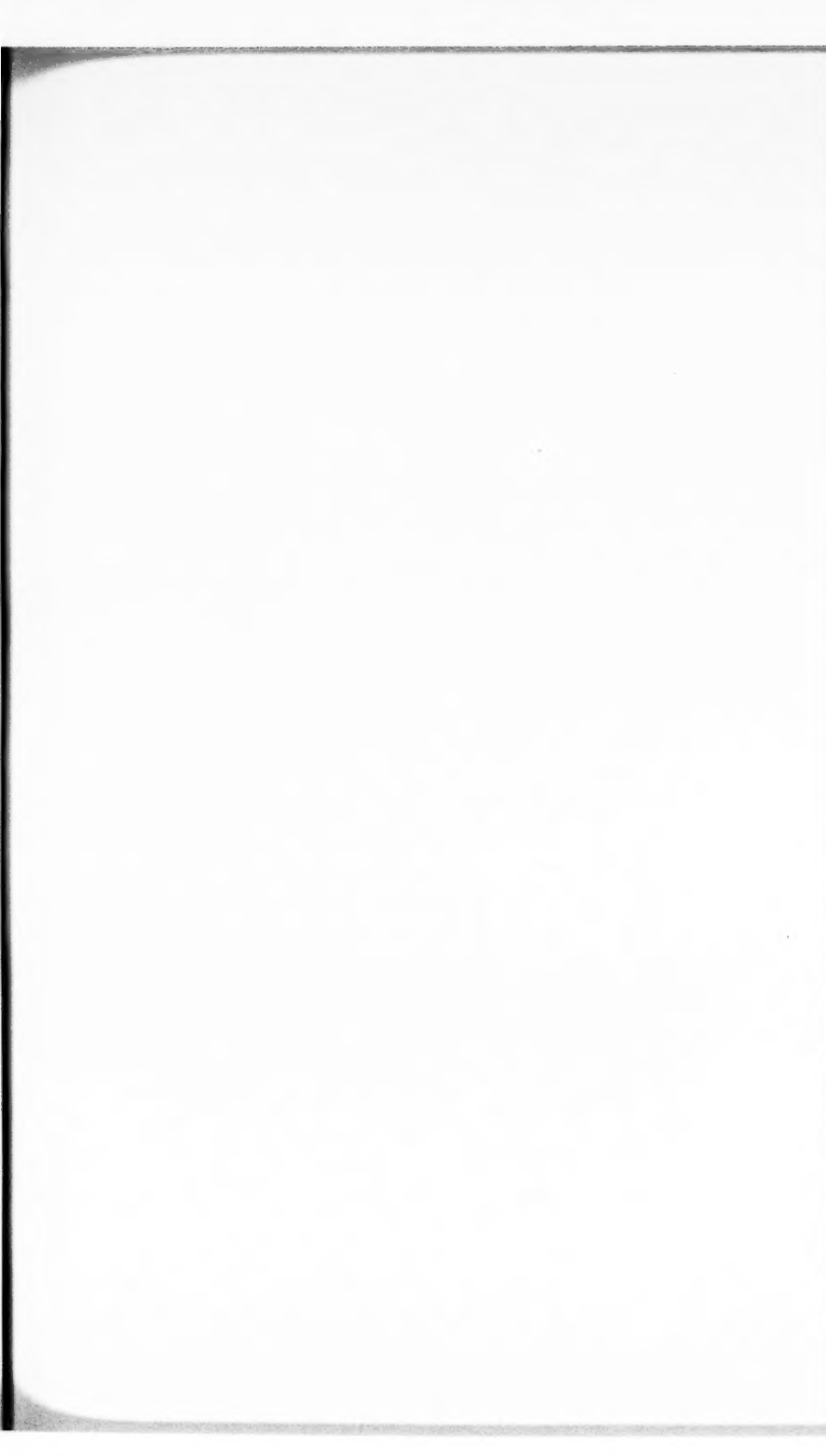
Respectfully submitted,

By HUGH AKERMAN,

As Counsel for Petitioners.

ARTHUR F. ROBERT,

Of Counsel for Petitioners.





APPENDIX TO PETITION FOR CERTIORARI.

PURNELL ACT.

[43 Stat. 970, chap. 308, Secs. 1-6]
[7 U.S.C. 361, 366, 370, 371, 373-376, 380, 382]
[Public, No. 458; 68th Congress]
[H.R. 157 Approved Feb. 24, 1925]

43 Stat. 970.

Chap. 308.—An Act to authorize the more complete endowment of agricultural experiment stations, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the more complete endowment and maintenance of agricultural experiment stations now established, or which may hereafter be established, in accordance with the Act of Congress approved March 2, 1887, there is hereby authorized to be appropriated, in addition to the amounts now received by such agricultural experiment stations, the sum of \$20,000 for the fiscal year ending June 30, 1926; \$30,000 for the fiscal year ending June 30, 1927; \$40,000 for the fiscal year ending June 30, 1928; \$50,000 for the fiscal year ending June 30, 1929; \$60,000 for the fiscal year ending June 30, 1930; and \$60,000 for each fiscal year thereafter, to be paid to each State and Territory; and the Secretary of Agriculture shall include the additional sums above authorized to be appropriated in the annual estimates of the Department of Agriculture, or in a separate estimate, as he may deem best. The funds appropriated pursuant to this Act shall be applied only to paying the necessary expenses of conducting investigations or making experiments bearing directly on the production, manufacture, preparation, use, distribution, and marketing of agricultural

products and including such scientific researches as have for their purpose the establishment and maintenance of a permanent and efficient agricultural industry, and such economic and sociological investigations as have for their purpose the development and improvement of the rural home and rural life, and for printing and disseminating the results of said researches.

SEC. 2. That the sums hereby authorized to be appropriated to the States and Territories for the further endowment and support of agricultural experiment stations shall be annually paid in equal quarterly payments on the 1st day of January, April, July, and October of each year by the Secretary of the Treasury upon a warrant of the Secretary of Agriculture out of the Treasury of the United States, to the treasurer or other officer duly appointed by the governing boards of such agricultural experiment stations to receive the same and such officers shall be required to report to the Secretary of Agriculture on or before the 1st day of September of each year a detailed statement of the amount so received and of its disbursement on schedules prescribed by the Secretary of Agriculture. The grants of money authorized by this Act are made subject to legislative assent of the several States and Territories to the purpose of said grants: *Provided*, That payment of such installments of the appropriation herein authorized to be made as shall become due to any State or Territory before the adjournment of the regular session of the legislature meeting next after the passage of this Act shall be made upon the assent of the governor thereof duly certified to the Secretary of the Treasury.

SEC. 3. That if any portion of the moneys received by the designated officer of any State or Territory for the further and more complete endowment, support, and maintenance of agricultural experiment stations as provided in this Act shall by any action or contingency be diminished or lost or be misapplied, it shall be replaced by said State or Territory to which it belongs, and until so replaced no subsequent appropriation shall be apportioned or paid to such State or Territory, and no portion of said moneys exceeding 10 per centum of each annual appropriation shall

be applied directly or indirectly, under any pretense whatever, to the purchase, erection, preservation, or repair of any building or buildings or to the purchase or rental of land. It shall be the duty of each of the said stations annually, on or before the 1st day of February, to make to the governor of the State or Territory in which it is located a full and detailed report of its operations, including a statement of receipts and expenditures for the fiscal year next preceding a copy of which report shall be sent to each of the said stations and the Secretary of Agriculture and to the Secretary of the Treasury of the United States.

SEC. 4. That on or before the 1st day of July in each year after the passage of this Act the Secretary of Agriculture shall ascertain and certify to the Secretary of the Treasury as to each State and Territory whether it is complying with the provisions of this Act and is entitled to receive its share of the annual appropriations for agricultural experiment stations under this Act and the amount which thereupon each is entitled, respectively, to receive. If the Secretary of Agriculture shall withhold from any State or Territory a certificate of its appropriation, the facts and reasons therefor shall be reported to the President and the amount involved shall be kept separate in the Treasury until the close of the next Congress in order that the State or Territory may, if it shall so desire, appeal to Congress from the determination of the Secretary of Agriculture. If the next Congress shall not direct such sum to be paid, it shall be covered into the Treasury. The Secretary of Agriculture is hereby charged with the proper administration of this law.

SEC. 5. That the Secretary of Agriculture shall make an annual report to Congress on the receipts and expenditures and work of the agricultural experiment stations in all of the States and Territories, and also whether the appropriation of any State or Territory has been withheld; and if so, the reason therefor.

SEC. 6. That Congress may at any time amend, suspend, or repeal any and all of the provisions of this Act.

Approved, February 24, 1925.

SUPREME COURT OF THE UNITED STATES

No. _____, October Term, 1943.

WAYNE M. NEAL; THE LOUISVILLE DRYING
MACHINERY COMPANY, A CORPORATION
ORGANIZED AND EXISTING UNDER THE
LAWS OF THE STATE OF KENTUCKY; AND
CITRUS PATENTS COMPANY, A CORPORA-
TION ORGANIZED AND EXISTING UNDER THE
LAWS OF FLORIDA, - - - - - *Petitioners,*

v.

STATE OF FLORIDA, A SOVEREIGN STATE OF THE
UNITED STATES OF AMERICA; THE STATE
BOARD OF EDUCATION OF FLORIDA, A BODY
CORPORATE UNDER THE CONSTITUTION AND
LAWS OF THE STATE OF FLORIDA; AND
STATE BOARD OF CONTROL, A BODY COR-
PORATE UNDER THE LAWS OF THE STATE
OF FLORIDA.

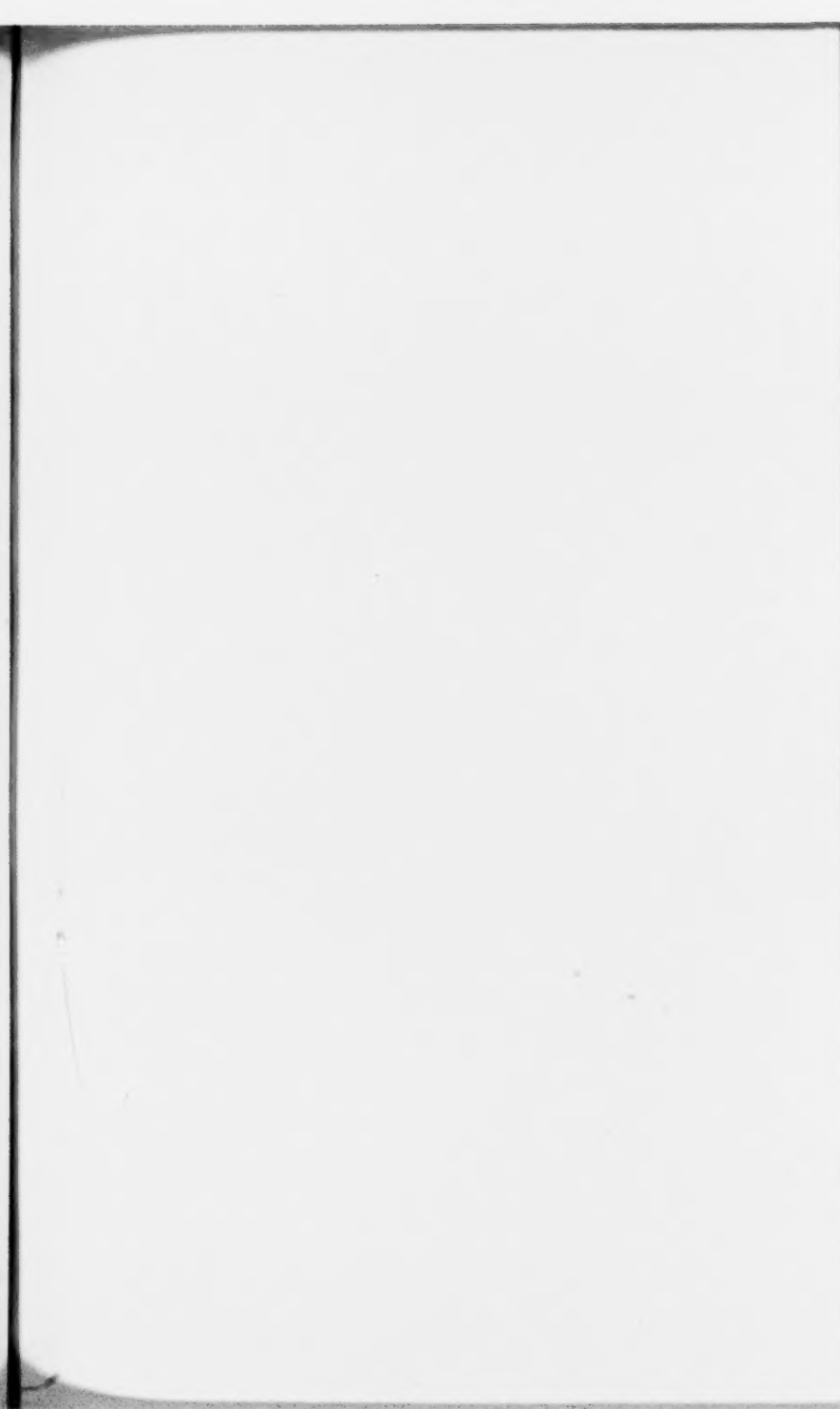
**ORDER EXTENDING TIME WITHIN WHICH TO
FILE PETITION FOR CERTIORARI.**

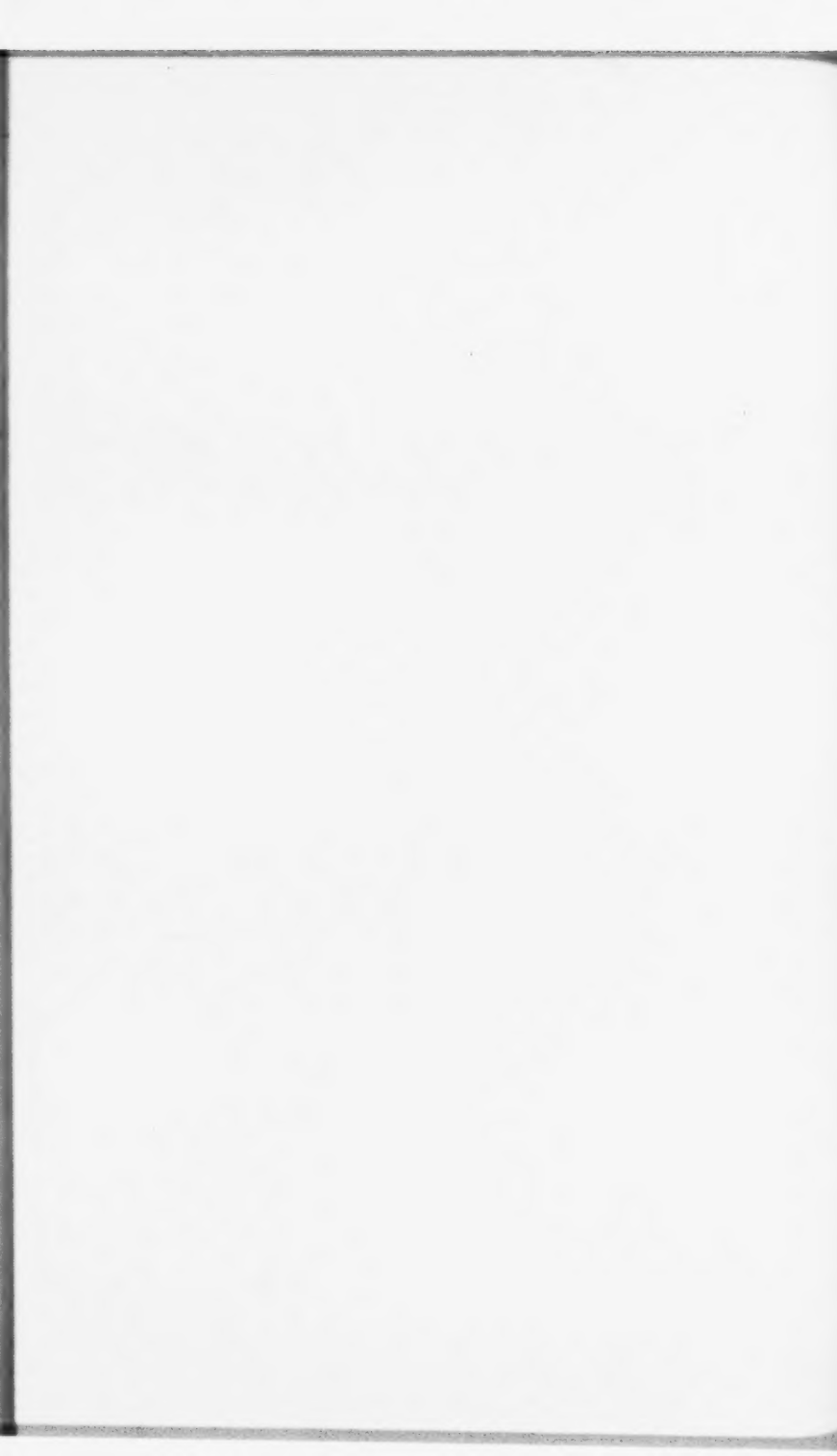
UPON CONSIDERATION of the application of coun-
sel for the petitioners,

IT IS ORDERED that the time for filing petition for
certiorari in the above-entitled cause be, and the same is
hereby, extended to and including September thirtieth,
1943.

(Signed) STANLEY REED,
*Associate Justice of the Supreme Court
of the United States.*

Dated this 7th day of September, 1943.





OCT 27 1943

CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term, 1943

No. 389

**WAYNE M. NEAL; THE LOUISVILLE
DRYING MACHINERY COMPANY; and
CITRUS PATENTS COMPANY, - - -** Petitioners,

versus

**STATE OF FLORIDA; THE STATE
BOARD OF EDUCATION OF FLORIDA;
and THE STATE BOARD OF CONTROL,** Respondents.

**RESPONDENTS' BRIEF
OPPOSING
WRIT OF CERTIORARI**

J. TOM WATSON,
Attorney General of Florida,

LEWIS W. PETTEWAY,
Asst. Attorney General of Florida,
Counsel for Respondents.

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Supreme Court of the United States

October Term, 1943

No. 389

WAYNE M. NEAL; THE LOUISVILLE DRYING
MACHINERY COMPANY; AND CITRUS PAT-
ENTS COMPANY - - - - - *Petitioners,*

v.

STATE OF FLORIDA; THE STATE BOARD OF
EDUCATION OF FLORIDA; AND THE STATE
BOARD OF CONTROL - - - - - *Respondents.*

RESPONDENTS' BRIEF OPPOSING WRIT OF CERTIORARI

OPINIONS OF THE COURT BELOW

1. The *original* opinion and the *amended* opinions of the Supreme Court of Florida are correctly cited in petitioners' brief in support of their petition.

JURISDICTION

Jurisdiction of this court is invoked by petitioners under Section 237 of the Judicial Code as amended [28 U. S. C., Sec. 344 (b)].

The foregoing statute is the only authority for taking a case to the federal Supreme Court from the highest court of a state, and the right to review the decision of a state court exists only in cases strictly within its terms.

Caperton v. Ballard, 14 Wall. 238, 20 L. Ed. 885;
Gorman v. Washington University, 62 S. Ct. 962, 86
L. Ed. 1300.

The burden is upon petitioners to show affirmatively that the United States Supreme Court has jurisdiction.

Memphis Natural Gas Co. v. Beeler, 62 S. Ct. 857,
86 L. Ed. 1090.

We respectfully submit that it affirmatively appears that this court does *not* have jurisdiction to review the foregoing decisions of the Supreme Court of Florida by writ of certiorari because:

(A) The petition herein was not filed in this court within the time prescribed by statute.

(B) The decisions sought to be reviewed are not final judgments or decrees subject to review by this court;

(C) It does not affirmatively appear that any federal statute, ground, question, right or title is involved.

ARGUMENT

(A) The Petition Herein Was Not Filed in This Court Within the Time Prescribed by Statute.

The federal statute [28 U. S. C., Sec. 350] provides that no writ of certiorari intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judg-

ment or decree. For good cause shown said period of time may be extended not exceeding sixty days by a Justice of the Supreme Court.

The *original* opinion by the Florida Supreme Court (R. 306-10), is dated March 23, 1943. This opinion finally determined the issues between the appellants [Respondents herein] and appellees [petitioners herein].

On April 5, 1943, Louisville Drying Machinery Company and Citrus Patents Company filed with the Supreme Court of Florida their petition for rehearing (R. 310-14). On the following day, April 6, 1943, Wayne M. Neal filed his petition for rehearing (R. 314-31). Both these petitions for rehearing were denied on April 13, 1943 (R. 331). On April 19, 1943, Wayne M. Neal filed his motion for leave to file an extraordinary petition for rehearing (R. 331-38), which application was denied on May 3, 1943 (R. 339). Thereafter Wayne M. Neal took no further steps in the cause and as to him the *original* opinion dated March 23, 1943, became final as of the date his petition for rehearing was denied [April 13, 1943]. Hence more than three months had passed from the date his petition for rehearing was denied and the date [August 12, 1943] when this court first extended the time for filing the petition for writ of certiorari in this court.

Under the decisions of this court the petition of Wayne M. Neal comes too late.

Citizens Bank v. Opperman, 249 U. S. 448, 39 S. Ct. 330, 63 L. Ed. 701;

Rust Land, etc., Co. v. Jackson, 250 U. S. 71, 39 S. Ct. 421, 63 L. Ed. 850;

Morse v. United States, 270 U. S. 151, 46 S. Ct. 241, 70 L. Ed. 518.

On May 14, 1943, Louisville Drying Machinery Co., and Citrus Patents Co., filed their petition (R. 339) asking that the Florida Supreme Court recall its mandate, grant a rehearing in said cause, and modify its opinion so that a decree could be entered dismissing the bill as to Louisville Drying Machinery Co., and doing justice and equity to the defendant Citrus Patents Co. The justice and equity sought in said petition by Citrus Patents Co., related to certain equities between Citrus Patents Co., and Wayne M. Neal as disclosed by the petition (R. 339-40). This petition had nothing to do with the rights of respondents herein as determined by the Florida Supreme Court in its *original* opinion dated March 23, 1943.

The petition for modification of the opinion was granted (R. 341) and the *original* opinion was amended by directing the Chancellor "to enter such decree as justice and equity may require as to Louisville Drying Machinery Company and as affecting it and W. M. Neal and Citrus Patents Company."

Subsequently Louisville Drying Machinery Co., and Citrus Patents Co., filed on June 1, 1943, their application for permission to file an extraordinary petition for rehearing (R. 342-46), which was denied on June 7, 1943 (R. 348).

Thus no petition for rehearing was ever granted by the Supreme Court of Florida for the purpose of changing its *original* opinion dated March 23, 1943, in which the rights of respondents herein were determined by that court. The only petition granted had to do with claims existing between the fellow defendants Wayne M. Neal and Citrus Patents Co., and permitting the Chancellor to dismiss the cause as to Louisville Drying Machinery Co., if equity so required—based on the claim of Louisville Drying Machinery Co., that it had no interest in the patent application.

Therefore, we submit that the time for filing petition for writ of certiorari in this court by the petitioners Citrus Patents and Louisville Drying Machinery Co., began to run as of the date their first petition for rehearing was denied [April 13, 1943]. And the three months period allowed by the statute had expired prior to August 12, 1943, when this court first extended the time for filing petition for writ of certiorari herein.

Cresswell ex rel. Di Pierro v. Tillinghast, 286 U. S. 560, 52 S. Ct. 648, 76 L. Ed. 1293;

Finn v. Railroad Com. of Calif., 286 U. S. 559, 52 S. Ct. 646, 76 L. Ed. 1293.

Under the decisions of this court hereinbefore cited, the petition of Citrus Patents Co., and Louisville Drying Machinery Co., comes too late, especially in view of the fact that the only decision of the Supreme Court of Florida under attack here is the *original* opinion dated March 23, 1943.

(B) The Decisions Sought to be Reviewed Are Not Final Judgments or Decrees Subject to Review by This Court.

If the *original* opinion dated March 23, 1943, and the modification thereof dated May 25, 1943, are to be considered as one opinion bearing the latter date, and thus bring the petition herein within the statutory time limit, then we submit that such judgment or decree is not final and complete.

In the Florida Supreme Court there was a plurality of appellees [petitioners here] and the modified opinion of May 25, 1943, failed to dispose of the controversy as to all parties but directed the Chancellor "to enter such decree as justice and equity may require as to Louisville Drying

Machinery Company and as affecting it and W. M. Neal and Citrus Patents Company." Thus there still remained certain further proceedings in the court of original jurisdiction.

Under the decisions of this court such a judgment is not subject to review by the United States Supreme Court.

Meagher v. Minnesota Thresher Mfg. Co., 145 U. S. 608, 12 S. Ct. 876, 36 L. Ed. 834;

National Bank of Rondout v. Smith, 156 U. S. 330, 15 S. Ct. 358, 39 L. Ed. 441;

Bostwick v. Brinkerhoff, 106 U. S. 3;

Rice v. Sanger, 144 U. S. 197;

Patterson v. United States, 15 U. S. 221, 2 Wheat. 221, 4 L. Ed. 224.

(C) It Does Not Affirmatively Appear That Any Federal Statute, Ground, Question, Right or Title is Involved.

The Supreme Court has no jurisdiction to review a state court decision unless it appears affirmatively from the record not only that a federal question was presented for decision to highest court of state having jurisdiction, but that its decision of the federal question was necessary to determination of the cause, that the federal question was actually decided, or that judgment as rendered could not have been given without deciding it.

Southwestern Bell Telephone Co. v. State of Oklahoma, 58 S. Ct. 528, 303 U. S. 206, 82 L. Ed. 751.

Assignments of error which involve no federal question cannot be considered.

Central Vermont R. Co. v. White, 238 U. S. 507, 35 S. Ct. 865, 59 L. Ed. 1433.

There are six assignments of error presented in the present petition for writ of certiorari. The first five relate to the Purnell Act and the sixth relates to the Fourteenth Amendment.

(D) Assignments Relating to the Purnell Act.

1. Inasmuch as the jurisdiction of this court is invoked under Section 237 of the Judicial Code as amended [28 U. S. C., Sec. 344 (b)] these assignments should be considered in the light of that statute.

The *validity* of the Purnell Act, a statute of the United States, was not and could not have been questioned in this case in the Florida Supreme Court.

No question was presented or decided concerning the validity of any State statute.

No title, right, privilege, or immunity was specially set up or claimed by either party, or passed upon by the Florida Supreme Court, under any statute of the United States.

A study of the opinion of March 23, 1943, will conclusively show that the Florida Supreme Court *did not* hold that respondents herein were entitled to the patent application by virtue of the Purnell Act.

The Florida Supreme Court gave seven incidents *supporting* their conclusion (R. 308). Fully fifty per cent of those enumerated incidents have nothing whatever to do with the Purnell Act. Those incidents relating to the Purnell Act were not of such character as to control the decision of the court. The Purnell Act was not the con-

trolling factor as evidenced by the following language from the opinion (R. 309):

“The Experiment Station was designed for works of this kind and not as an aid to private enterprise. One of the things most desired at the time was a process by which citrus waste could be utilized. The correspondence and the testimony of all the parties to this transaction shows that this was their understanding and that Dr. Neal was *employed for this purpose.*”

Petitioners' discussion under their first assignment of error fails to disclose any federal question for determination by this court.

2. Under petitioners' discussion of their second assignment of error the following statement is made: “The denial of a Federal right based on an unsupported finding of fact, presents a reviewable question of law.” We do not question that as a correct statement of law, however, we do seriously question its applicability here.

What is the federal right denied?

The only federal statute mentioned in the lower court's opinion is the Purnell Act. What rights do petitioners have under that Act? They have none, and as a matter of fact they claim no rights under that Act.

Petitioners' second assignment of error does not even approach a federal question. They have shown no right to question the expenditure of Purnell funds, and of course have no right to question the expenditure of such funds. Sections 3 and 4 of the Purnell Act [43 Stat. 970] prescribe the procedure where such funds are misapplied.

3. It is sufficient answer to petitioners' argument under their third assignment of error to refer the court to

the following quotation from the opinion sought to be reviewed (R. 310):

“On the question of whether or not Citrus Products Company was a purchaser in due course without notice, it appears that reliance is placed primarily on a conversation they had with the director of the Experiment Station who said in substance that they had nothing more than a gentleman’s agreement with Dr. Neal and that if he repudiated that, appellants had no way to enforce it.

“This was a misleading statement but there were plenty of red flags flying to warn appellees. *The contract between the Experiment Station and Dr. Neal was the determinative answer to this question and the record shows that appellees were on notice of this contract.* They were also on notice of the Purnell Act and its purpose. *Either of these factors was sufficient answer to this question so we do not deem it necessary to labor the opinion with further discussion of the question of notice.*”

Obviously the court did not base its decision exclusively on the fact that petitioners were on notice of the Purnell Act. It is equally as obvious that the decision would have been the same without this reference to the Purnell Act.

This court has said that where the state court rested its judgment upon a non-federal ground adequate to support it, the existence of a federal question is of no significance.

Billby v. Stewart, 246 U. S. 255, 38 S. Ct. 264, 62 L. Ed. 701;

People ex rel. Doyle v. Atwell, 261 U. S. 590, 43 S. Ct. 410, 67 L. Ed. 814.

4. Under their fourth and fifth assignments of error petitioners in effect say that if they cannot obtain the invention in question then it should be owned and held by some federal interest such as the Secretary of Agriculture.

We submit that under these two assignments of error petitioners are attempting to advance arguments which could only be advanced, if at all, by some federal interest, such as the Secretary of Agriculture.

Petitioners must show that enforcement of the questioned judgment would deprive them, not some federal agency, of some right arising under the federal Constitution or statutes.

Liberty Warehouse Co. v. Burley Tobacco Growers Co-op Marketing Ass'n, 276 U. S. 71, 48 S. Ct. 291, 72 L. Ed. 473.

Grants to the several states such as made by the Purnell Act are considered as trusts imposed in the several states by Act of Congress, and the obligation imposed thereby rests on the good faith of the state and does not attach to the funds themselves. The observance of the conditions of the grant rests only in the sovereign relations of the two governments and may not be questioned by a private party.

American Emigrant Co. v. Adams County, 100 U. S. 61, 25 L. Ed. 563;

Mills County v. Burlington & M. R. Co., 107 U. S. 557, 2 S. Ct. 654, 27 L. Ed. 578.

We submit that petitioners' fourth and fifth assignments of error are wholly without merit.

(E) Assignments of Error Relating to Fourteenth Amendment.

Only the sixth assignment of error relates to the Fourteenth Amendment.

Under this assignment of error petitioners complain that they had no notice of any contract of employment based on the Purnell Act and that notice of such contract was not in issue in the court below.

As we have previously pointed out, the Supreme Court of Florida held that petitioners herein were on notice of the employment contract, and also of the Purnell Act, but notice of either was sufficient. Therefore the court's decision was not based upon notice of the Purnell Act nor was notice of said Act necessary to a determination of the cause.

Petitioners say they had no notice whatever of any contract to invent and that no such contract was in issue. We call the court's attention to the answer of Wayne M. Neal (R. 11), wherein, in answering the bill of complaint, he says:

"He was not employed to invent methods or processes, and the discovery by this defendant of said process for removing moisture from citrus waste *was not within the scope of his employment.*"

The answer of Louisville Drying sets out (R. 15) that:

"It admits that the defendant, Wayne M. Neal, was employed as a member of the Research Staff of said Agricultural Experiment Station, in 1935. It is without knowledge as to whether or not the said Wayne M. Neal was named one of the leaders on Florida Agricultural Experiment Station Official Project #239, dealing with the particular phase of animal husbandry designated on project statement as 'The Digestability and Coefficient Value of Dry

Grapefruit and Dry Orange Refuse', and that the said Wayne M. Neal became interested in the problem of discovering a process of eliminating moisture from citrus wastes, resulting in canning operations, which citrus wastes could be used as livestock feed, while conducting experiments pursuant to said project."

The answer of Citrus Patents Co., contains the same allegation (R. 21).

Thus these matters were in issue and all three petitioners participated in the taking of testimony thereon and based upon such testimony the Supreme Court of Florida (R. 310) said that "there were plenty of red flags flying to warn" them of the employment contract and petitioners' rights thereunder.

This case involves nothing more than the ownership of property—the invention in question; and the decision of a state court, involving nothing more than the ownership of property, with all parties in interest before it, cannot be regarded by the unsuccessful party as a deprivation of property without due process of law, simply because its effect is to deny his claim to own such property. The Fourteenth Amendment did not impair the authority of the states, by their judicial tribunals, and according to their settled usages and established modes of procedure, to determine finally, for the parties before it, controverted questions as to the ownership of property which did not involve any right secured by the federal Constitution, or by any valid Act of Congress, or by any treaty.

Tracy v. Ginzberg, 205 U. S. 170, 27 S. Ct. 461, 51 L. Ed. 755.

In Florida it is settled practice that where an amendment is allowable, the Supreme Court will give to the party

entitled thereto the same benefit of the amendment as though it had been actually made.

Campbell v. Chaffee, 6 Fla. 724;

Southern Liquor Distributors v. Kaiser, 150 Fla. 52,
7 So. 2d 600.

It is also generally recognized that where the evidence received without objection supports the verdict, the pleadings, if defective, will be considered by an appellate court to have been amended to conform to the proof.

A. Coolot Co. v. L. Kahner & Co., 72 C. C. A. 248,
140 Fed. 836;

Sacramento Suburban Fruit Lands Co. v. Lindquist,
39 Fed. 2d 900, certiorari denied, 51 S. Ct. 31, 282
U. S. 853, 75 L. Ed. 756.

The question of the scope of Neal's employment contract was not, however, one which first came to the attention of petitioners in the opinion by the Florida Supreme Court. They were aware of that element of the case long before it was decided by the Florida Supreme Court. In the trial court on March 3, 1941, Citrus Patents Co., filed motion to dismiss the bill of complaint. On the same date Louisville Drying Machinery Co., filed a similar motion. Grounds 8 and 11 of each motion touch upon this phase of the case (R. 37-39).

On August 18, 1942, respondents herein filed their assignments of errors with the trial court (R. 33). Assignments 4, 5 and 6 very clearly refer to the scope of the employment contract.

This court will observe from the record (R. 40) that the foregoing motions to dismiss were included in the transcript at the direction of petitioners herein—and yet,

the court will find no cross-assignments of errors by said petitioners, although said motions to dismiss were denied by the Chancellor (R. 39).

It seems obvious from the record and from petitioners' own argument that they have not been denied due process of law. They were present in a court of competent jurisdiction; they participated in the taking of testimony on the very questions presented here; they had an opportunity to and were heard on the questions involving the scope of the contract of employment as well as notice thereof; they failed to make cross-assignments of error; and they do not show that the evidence on these issues would be different if the cause were retried.

CONCLUSION

We respectfully submit that the petition should be denied because

(1) The statutory period of time had elapsed before the petition was filed;

(2) The judgment is not final and complete so as to give this court jurisdiction;

- (3) A federal right is assumed where none exists;
- (4) Petitioners have had their day in court and have not been denied due process of law.

Respectfully submitted,

J. TOM WATSON,
Attorney General of Florida,

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Counsel for Respondents.



(20)

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CLERK

Supreme Court of the United States

October Term, 1943.

No. 389

WAYNE M. NEAL, THE LOUISVILLE DRYING
MACHINERY COMPANY and CITRUS PAT-
ENTS COMPANY, - - - - - Petitioners,

versus

STATE OF FLORIDA, THE STATE BOARD OF
EDUCATION OF FLORIDA; and STATE
BOARD OF CONTROL.

PETITION FOR REHEARING.

HUGH AKERMAN,
Counsel for Petitioners.

ARTHUR F. ROBERT,
Of Counsel for Petitioners.



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STATE OF FLORIDA, THE STATE BOARD OF EDUCA-
TION OF FLORIDA AND STATE BOARD OF CONTROL.

PETITION FOR REHEARING.

*To the Honorable, the Chief Justice and the Associate Jus-
tices of the Supreme Court of the United States:*

This court entered an order on November 8, 1943, sum-
marily denying defendants' petition for writ of certiorari
to the Supreme Court of Florida, filed September 27, 1943.

GROUND.

Defendants now bring this petition for rehearing and
respectfully request this court particularly to reconsider
questions (a) and (f), raised in the petition for certiorari
by the first and last assignments of error, on the following
grounds:

1. That each and every conceivable ground, including Project 239 and Neal's activities under that Project, upon which the Florida Supreme Court based Neal's specific contract of employment, was entirely and exclusively federally based; and

2. That the same fundamental due process violation condemned by this court in *Saunders v. Shaw*, 244 U. S. 317, 61 L. E. 1163, 37 S. C. 638, is involved in this case.

ARGUMENT.

Summary.

1. The Florida Supreme Court, in concluding that Neal's employment contract became specific when Project 239 was set up under the Purnell Act and Neal placed in charge, based that specific contract exclusively on federal grounds because:

- (a) the Purnell Act is a federal Act;
- (b) Neal was a Purnell employee whose entire activities had to be and were strictly based on, and strictly confined within the scope of, the Purnell Act; and
- (c) Project 239 was a Purnell project which had to be and was strictly based on, and strictly confined within the scope of, the Purnell Act.

2. The court intended to base Neal's specific employment contract exclusively on federal grounds because:

- (a) a federal basis gives meaning to all statements made by the court in its opinion; and
- (b) a non-federal basis vitiates the meaning of many such statements.

3. Defendants may assert, as a right under the Purnell Act, their right to be unmolested by an unwarranted and erroneous interpretation and application of the Purnell Act.

4. Neal's specific federally-based employment contract was not an issue during trial because the pleadings did not allege that Neal was a Purnell employee, that Project 239 was a Purnell project, and that Neal was assigned to a Purnell project.

5. In the absence of evidence by plaintiff respecting notice or knowledge by the corporate defendants of Neal's specific federally-based employment contract, *Saunders v. Shaw, supra*, is authority for holding *first* that the corporate defendants were under no duty to introduce evidence affirmatively establishing their lack of notice or knowledge and *second* that the defendant corporations had no opportunity, no occasion, and no right to introduce such evidence during trial.

6. If defendant corporations lost title to the Neal application because they had notice of the Purnell Act itself, a federal question is raised which should be determined.

7. On the other hand, if the corporate defendants lost title to the Neal application because of the court's holding that they had actual notice of the federally-based employment contract aside from the Act itself, then that holding, being unsupported by evidence, and outside of the issues of the case, on the authority of *Saunders v. Shaw, supra*, violates the right of the defendant corporations to a hearing under the due process clause of the Fourteenth Amendment of the Federal Constitution.

First Assignment of Error.

For convenience we set forth the question raised by this assignment as follows:

- (a) Where an Experiment Station employee, while employed under a general contract, is assigned to a generally worded Purnell project conducted by the Experiment Station under the Purnell Act, does the general employment contract become, at the time of the Purnell project assignment, by virtue of the language of the Purnell Act itself, an express or specific employment contract binding the employee to assign all Purnell inventions, *i. e.*, inventions which relate to the project and which are made by him while working on the project?

The Florida Supreme Court concluded that Neal became specifically employed when Project 239 was set up under the Purnell Act and Neal placed in charge. The conclusion obviously is based on one or more of the following items:

1. Project 239;
2. the Purnell Act; and
3. Neal's assignment to the Project.

The Court's intention to base its conclusion on one or more of the three items mentioned is further evidenced by a number of specific references to (1) the project, (2) the Act and (3) Neal's activities under the project, which references are cited by the Court as supporting its conclusion. *If Project 239 and Neal's activities under it are both federally based, then, since the Purnell Act is a federal act, the court's conclusion is entirely federally based. If the court's conclusion is entirely federally based, then it follows that Neal's specific employment contract is federally*

based. Accordingly, it may be said that question (a) above is raised if Project 239 and Neal's activities under it are federally based.

We assert that Project 239 and Neal's activities under it are federally based. To demonstrate the soundness of our assertion, we call attention to a letter (Neal's Exhibit 12) written in January, 1940, by the Experiment Station Director (R. 96) to Dr. Neal's superior, Dr. Shealy, and we quote from it as follows:

"Dr. Neal's salary is paid exclusively from the Purnell Fund, a fund appropriated by Congress and administered by the Secretary of Agriculture, through the Office of Experiment Stations of the United States Department of Agriculture. Congress has charged the Secretary of Agriculture with making and enforcing rules and regulations insuring that the Purnell Fund be used for the purposes specified in the Act of Congress itself. The sole and exclusive purpose of the Purnell Fund is to finance research of a scientific character under projects approved by the Office of Experiment Stations.

"The Secretary of Agriculture has long since ruled very definitely that no employee drawing his entire salary from a Federal Fund or funds can engage in teaching work. This rule is very strictly enforced by the Office of Experiment Stations, and strict compliance with it is one of the conditions under which the Florida Experiment Station has the benefit of Purnell Fund research expenditures at this Experiment Station.

"Congress did not intend or provide that any expenses of resident instruction to students should be defrayed directly or indirectly from the Purnell Fund.

"There is no contribution towards Dr. Neal's salary either from University of Florida teaching funds or from State funds appropriated to or available to the Experiment Station."

This quotation and the record (R. 96, 149, 248-49) make abundantly clear that Neal was a Purnell employee drawing his entire salary during his entire term of employment from the Purnell fund and that, *as a Purnell employee, all of Neal's activities not only had to be but were strictly confined within the scope of and thus based on the Purnell Act to insure "that the Purnell fund be used for the purposes specified in the Act of Congress itself."* **Neal's activities are thus federally based.**

Project 239 was a Purnell project. It was approved by the Office of Experiment Stations of the United States Department of Agriculture in Washington (R. 133-134). The foregoing quotation makes abundantly clear that *Purnell projects had to be and were strictly confined to the scope of and thus based on the Purnell Act to insure "that the Purnell fund be used for the purposes specified in the Act of Congress itself."* **Purnell Project 239 is thus federally based.**

That the court intended to base Neal's specific employment contract exclusively on federally-based grounds is further indicated by the fact that *only a federal basis gives meaning to all of the statements made by the court in its opinion, while a non-federal basis vitiates the meaning of many of such statements.* For example, the court quotes language from Section 1 of the Act as supporting its conclusion respecting the change in Neal's employment from general employment to specific employment. *How could that language support a specific contract based on grounds independent of the Act, such as non-federal grounds?* Again, the court finds that the payment of patent expenses from the Purnell fund is conclusive evidence of the specific contract. *Now how could that be, if the specific contract were based on grounds independent of the Purnell Act, such as non-federal grounds?* A non-federal basis completely vitiates the meaning of the court's holding that

notice of the Purnell Act is notice of the contract. *How could notice of a federal Act be notice of a contract based on non-federal grounds?*

In concluding this point, we reassert: **first**, that the Florida Supreme Court intended to and did base Neal's specific contract squarely and exclusively on the Purnell Act; **second**, that, in doing so, it erroneously interpreted or gave unwarranted effect to that Act since the Act makes no provision whatsoever for inventions; and **third**, that, as a result of this error, defendants' rights were violated, the defendant, Neal, losing his right to sell the Neal application, the defendant, Citrus Patents Company, losing its right to buy, and its title in, the Neal application, and the defendant, Louisville Drying Machinery Company, losing whatever rights the Florida courts seemed to think it has in the Neal application. *While the Purnell Act does not give the defendants any personal or affirmative rights, which can be enforced by a direct suit, they, nevertheless, may assert, as a right under the Purnell Act, their right to be unmolested by an unwarranted and erroneous interpretation and application of the Purnell Act.* Nutt v. Knut, 200 U. S. 13, 50 L. E. 348, 26 S. C. 216.

Sixth Assignment of Error.

For convenience the question raised by this assignment is repeated as follows:

- (f) Where a final judgment of the highest court of a state has the effect of depriving a defendant of property by holding that such defendant had notice of a **federally-based employment contract**, i. e., one based on and arising under the Purnell Act of Congress, does that holding constitute a deprivation of property without due process of law because that defendant had not the opportunity or the occasion for a hearing on the notice issue, on which the holding was based, since such issue:

first, was not joined in the pleadings during the trial; second, was before the highest court only on an appeal from the denial of plaintiff's motion, made at the conclusion of the trial, to amend the pleadings to conform to the evidence; and, third, was totally unsupported by any evidence whatsoever in the case?

In *Saunders v. Shaw*, 244 U. S. 317, 61 L. E. 1163, 37 S. C. 638, this court held that where, during trial, the trial court rules out some phase of plaintiff's testimony as not being admissible, the defendant is under no duty to rebut such testimony, even though the plaintiff succeeds in spreading it upon the record; hence if, upon plaintiff's appeal, the Appellate Court gave plaintiff a judgment based on such testimony, it violates defendants' rights under the due process clause of the Fourteenth Amendment.

We submit that the present case involves the same fundamental violation of the due process clause. As a basis for our demonstration of this fact, we outline the pertinent allegations (R. 2-3) of the complaint and the responsive pleadings (R. 15-16, 21-22) of both corporate defendants as follows:

<i>Complaint Article III alleges:</i>	<i>Corporation Answers Item 3 respond:</i>
1. Neal employed "prior to 1935" as member of Experiment Station Research Staff.	1. Admitted.
2. Neal assigned to Official Project 239 (not plead as a Project under Purnell Act).	2. No knowledge.
3. While working on project Neal becomes interested in eliminating moisture from citrus waste.	3. No knowledge.
4. Neal discloses his invention to Experiment Station Director in 1935.	4. No knowledge.
5. Neal enters 1935 oral agreement with Experiment Station.	5. Denied.

The foregoing outline makes clear that the pleadings afforded no basis during the trial for proving that Neal's general employment contract, created in 1929, became a specific federally-based employment contract in 1933 because the pleadings did not allege: that Neal was a Purnell employee; that Project 239 was a Purnell project under the Purnell Act; and that Neal was assigned to a Purnell project. **Thus, the 1933 specific federally-based employment contract was not an issue¹ during trial.**

Defendant corporations assert, as a matter of fact, that there is a **complete absence of evidence¹** showing that they had knowledge or notice: (a) of any specific employment contract under the Purnell Act or otherwise; or (b) of Project 239 either as a general project of the Experiment Station or as a Purnell project thereof; or (c) of Neal's employment on that project; or (d) of Neal's making the invention while working on that project; or (e) of the conduct, specified by the Florida Supreme Court, of the contracting parties under that project. **Thus, at the end of the trial, there was no evidence showing or even suggesting that defendant corporations had knowledge or notice of the 1933 specific federally-based employment contract.** Under these circumstances, *Saunders v. Shaw, supra* is authority for holding that corporate defendants during trial were under **no duty** to introduce evidence affirmatively establishing their lack of notice or knowledge. It is also authority for saying that the defendant corporation had **no opportunity, no occasion, and no right** to introduce such evidence during trial. Defendants' position was sustained by the trial judge who refused to allow plaintiff's motion, made at the end of trial, to amend the pleadings so that

¹The lack of issue or evidence is attested by pages 11-14 of "Respondents' Brief Opposing Writ of Certiorari."

Article III of the complaint would additionally allege some specific employment contract unidentified other than as a contract to invent.

The Florida Supreme Court held that the corporate defendants took title to the Neal application subject to plaintiff's rights therein because the corporate defendants had notice either of the Purnell Act or of the 1933 specific federally-based employment contract. *If this holding means that the corporate defendants lose title to the Neal application because they had notice of the Purnell Act, a federal question is raised which should be determined.* On the other hand, if it means that they had actual notice of the federally-based employment contract aside from the Act itself, then it is a holding completely unsupported by any evidence whatsoever, a holding based outside of the issues of the case and, on the authority of *Saunders v. Shaw*, *supra*, a holding which violently sweeps aside the rights of the defendant corporation to a hearing under the due process clause of the Fourteenth Amendment of the Federal Constitution.

Furthermore, since the 1933 specific employment contract was federally based, then the Florida Supreme Court's holding on notice of that federally-based employment contract does not bind this court because there is a complete absence of evidence to support it. *Postal Telegraph Cable Company v. City of Newport, Kentucky*, 247 U. S. 464, 62 L. E. 1215, 38 S. C. 566.

Defendant corporations assert that if this Court **should find** that the Florida Supreme Court was justified in holding that Neal was bound by a specific employment contract, then this court **should also find** that the Florida Supreme Court should have **either dismissed** the case as to the corporate defendants because of plaintiff's failure to prove notice, **or, remanded** it for further proceedings to give the

corporate defendants an opportunity to present evidence on the notice issue in question. The only alternative, which does **not require proof of notice**, is for this court to find that the employment contract was based by the Florida Supreme Court on the Purnell Act so that notice of the Act was notice of any contract under it, and if it were so based by the Florida Supreme Court, certainly a substantial federal question is raised which this court should determine.

Other Assignments of Error.

In the interests of brevity, we do not argue the other assignments here but, for our position as to them, rely on our original petition and brief.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the Order of November 8, 1943, denying defendants' petition for writ of certiorari should be revoked, this petition allowed, and the judgment of the Supreme Court of Florida reviewed and reversed.

Respectfully submitted,

By HUGH AKERMAN,
As Counsel for Petitioners.

ARTHUR F. ROBERT,
Of Counsel for Petitioners.